RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

TIMOTHY IVORY CARPENTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 19 MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors dedicated to safeguarding the First Amendment rights and freedom of information interests of the news media. Since 1970, the Reporters Committee has represented the interests of the press and the public in cases involving significant freedom of expression issues, including in this Court.

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights

guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowdfunding.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Consortium is a network of the country's leading, progressive, independent media outlets. Our mission is to amplify independent media's voice, increase our collective clout, leverage our current audience and reach new ones.

MPA – The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime en-

joyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

New England First Amendment Coalition is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

The News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public

generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

A journalist on assignment today is the proverbial one-man band with a cell phone for an instrument. Today, reporters use cell phones to set up and record interviews, write notes and articles, take pictures and video, share their work on social media, follow breaking news, research story tips, and engage in other functions essential to newsgathering. The cell phone has become a mobile newsroom. The government's ability, therefore, to reconstruct journalists' movements and location over an extended period of time using historical cell phone records threatens reporters' ability to maintain the confidentiality of their sources and gather the news. Because the government may seek a journalist's records in the course of a criminal investigation of another individual, such as a source, this threat exists even though a journalist's routine newsgathering is of course not a crime. Accordingly, this case presents a question critical to the news media: Whether the Fourth Amendment permits the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over an extended period of more than 125 days.

As news media organizations and organizations dedicated to protecting the First Amendment interests of journalists, amici have an interest in ensuring that the Fourth Amendment's protections against unreasonable searches and seizures are fully and strictly applied when the government seeks to obtain historical cell phone records showing a user's loca-

tion. Such records implicate First Amendment activities, including newsgathering, which will be chilled if warrantless acquisition of such records is routinely permitted. Properly applied, however, the Fourth Amendment affords protection to the exercise of First Amendment rights.

SUMMARY OF ARGUMENT

This case concerns the constitutionality of the warrantless acquisition by law enforcement of historical cellular telephone data revealing a comprehensive picture of an individual's location and movements. In this case, the government sought the data of a criminal suspect; but the standard governing such data adopted by the U.S. Court of Appeals for the Sixth Circuit below and advanced by the government here applies equally to the data of any cell phone user, including journalists. Because the Fourth Amendment's prohibition against "unreasonable searches and seizures" plays a vital role in protecting First Amendment rights, the question presented is one of particular importance to journalists and news organizations. Absent meaningful Fourth Amendment protection for records like those at issue in this case, activities protected by the First Amendment—including newsgathering, speech, expression, and association—will be chilled.

The Fourth Amendment's protection against unreasonable search and seizure is historically linked to the First Amendment's protection of the free press. As this Court has long recognized, the Fourth Amendment was ratified in response to the prerevolutionary practice of arresting publishers and confiscating papers to stifle dissenting viewpoints. The press's and the public's right to expressive and associational freedom therefore informs the scope of the Fourth Amendment's protection.

The records at issue in this case implicate precisely those rights. Historical cell site location information ("CSLI")—data gleaned from cell towers that

creates a record of an individual's location over time—can provide an intimate picture of an individual's political, professional, and religious associations. Such information can also reveal details about the newsgathering process, including reporters' communications with their sources, because the practical realities of contemporary newsgathering require journalists to carry and use cell phones on a near-constant basis. Due to the revelatory nature of location information, CSLI can be invasive even when it follows movements over a much shorter period of time than the 127-day tracking at issue in this case. The government's ability to acquire CSLI without meeting the Fourth Amendment's probable cause standard allows law enforcement to easily and routinely surveil both sources' and journalists' expressive, associational, and newsgathering activities, chilling individuals' willingness to engage in such activities.

In accord with the historical link between the First and Fourth Amendments, this Court has instructed lower courts to apply the Fourth Amendment with rigor when a search or seizure might implicate First Amendment interests. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978). Because CSLI reveals an individual's First Amendment-protected activities, it falls within the core category of information that the Fourth Amendment was designed to protect from warrantless surveillance. The U.S. Court of Appeals for the Sixth Circuit, below, however, expansively and erroneously applied the third-party doctrine to deprive the CSLI records at issue in this case of any Fourth Amendment protection. This ruling affects not just the rights of crimi-

nal suspects, but also the rights of any individual whose records could be relevant to any criminal investigation, which may include journalists.

For these reasons, *amici* urge this Court to reverse and to hold that the acquisition of CSLI records must satisfy the Fourth Amendment's requirements.

ARGUMENT

I. The history of the Fourth Amendment is intertwined with the First Amendment's guarantees of free expression and a free press.

The Fourth Amendment's prohibition against unreasonable searches and seizures arose from a long list of abusive English practices targeting printers and publishers of dissenting papers in the colonial era. Indeed, as this Court has stated, the history of the Fourth Amendment is "largely a history of conflict between the Crown and the press." *Stanford v. Texas*, 379 U.S. 476, 482 (1965). Pre-revolution "general warrants" allowed law enforcement to search "private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel," to the detriment of the free press. *Boyd v. United States*, 116 U.S. 616, 626 (1886).

Two landmark cases that help to form the basis for our understanding of the Fourth Amendment's history and purpose—*Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), and *Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763)—involved the press. *See Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961)

(explaining that these cases were "part of the intellectual matrix within which our own constitutional fabric was shaped").

In *Entick*, the British Secretary of State issued a general warrant for the arrest of a writer for a dissenting publication for seditious libel and the seizure of all of his papers. *See Stanford*, 379 U.S. at 483. The King's messengers ransacked the writer's house for four hours, seeking seditious material. *Id.* at 483–84. In an opinion this Court called "a wellspring of the rights now protected by the Fourth Amendment," Lord Camden declared the warrant unlawful: "His house is rifled, his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." *Id.* at 484 (quoting *Entick*, 19 How. St. Tr. At 1064). In response to *Entick*, the House of Commons passed two resolutions condemning such general warrants. *Id.* This Court has described *Entick* "as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law'" in the area of search and seizure. *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (quoting *Boyd*, 116 U.S. at 626).

A few years earlier in *Wilkes*, the Crown had similarly attempted to silence a publication that was anonymously published by John Wilkes, then a member of Parliament. *Stanford*, 379 U.S. at 483. The warrant in that case authorized the King's messengers "'to make strict and diligent search for the

authors, printers, and publishers of a seditious and treasonable paper, . . . and them, or any of them, having found, to apprehend and seize, together with their papers.'" *Id.* (quoting II May's Constitutional History of England, 246 (Am. Ed. 1864)). The messengers "set forth in quest of unknown offenders; and unable to take evidence, listened to rumors, idle tales, [ ] curious guesses," and "held in their hands the liberty of every man whom they were pleased to suspect." *Id.* at 483 (quoting II May's Constitutional History of England, 246 (Am. Ed. 1864)). Wilkes successfully sued the Secretary of State for damages, and Lord Camden condemned the general warrant, concluding that the "discretionary power given to messengers to search wherever their suspicions may chance to fall" was "totally subversive of the liberty of the subject." *Marcus*, 367 U.S. at 728–29 (quoting *Wilkes*, 19 How. St. Tr. at 1167).

Both *Entick* and *Wilkes* illustrate that "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression," *Marcus*, 367 U.S. at 729, and for undermining the freedom of the press. When Congress drafted the Bill of Rights, Lord Camden's monumental *Entick* opinion was doubtlessly "in the minds of those who framed the [F]ourth [A]mendment." *Boyd*, 116 U.S. at 626–27; *see also Zurcher*, 436 U.S. at 569 (Powell, J., concurring) (noting that "[t]he Framers were painfully aware" of the history of conflict between the Crown and the press). As Justice Douglas put it, the First and Fourth Amendments "are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience

and human dignity and freedom of expression as well.'" *Frank v. Maryland*, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting) (internal citations omitted). Thus, concerns about free expression, and in particular about protections for an unfettered press, are at the core of the history of the Fourth Amendment. "It was in the setting of freedom of expression that Lord Camden denounced the general warrants," and the Fourth Amendment therefore must be understood as a response to the "'effort to destroy the freedom of the press.'" *Id.* (citation omitted). Because of the shared historical concerns of the First and Fourth Amendments, the modern-day experiences of the press are particularly relevant to understanding Fourth Amendment safeguards.

II. Warrantless acquisition of CSLI records chills the exercise of First Amendment rights, including newsgathering.

More than 200 years later, the application of the Fourth Amendment is complicated by the advent of new communications technologies, some of which are essential to free expression and the newsgathering process. Due to the ubiquitous nature of cell phones, location information gleaned from cell towers can disclose an individual's expressive and associational activities, as well as details about a journalist's newsgathering process. Such disclosure threatens to chill First Amendment-protected activities.

A. Long-term tracking of historical CSLI can reveal sensitive First Amendment-protected activities.

Communications technology is crucial to the exercise of free expression and association. Cell phones in particular have become "so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification." *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010). Thus, as cell phones become more sophisticated, and cellular phone and data providers gather more sensitive information about users, the risk that warrantless surveillance of individuals' locations will chill associational and expressive freedoms only increases.

The location-tracking capabilities of cell phones implicate unique First Amendment concerns. Over time, changes in technology have made CSLI information increasingly precise. These changes have included "smaller and smaller [cell sites] . . . which cover a very specific area, such as one floor of a building, the waiting room of an office, or a single home," and "the advent of smartphone 'pinging,' whereby location data can be generated almost continuously . . ." *United States v. Graham*, 824 F.3d 421, 448 (4th Cir. 2016) (citations omitted). Thus, like GPS data, CSLI is "qualitatively different" from physical records because it "can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). As the U.S. Court of Appeals for the D.C. Circuit stated when it considered the constitutionality of warrantless GPS monitoring, "A person who

knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts." *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff'd in part sub nom. United States v. Jones*, 565 U.S. 400 (2012); *see also State v. Earls*, 70 A.3d 630, 632 (N.J. 2013) (New Jersey Supreme Court noting that cell phones can reveal "not only where individuals are located at a point in time but also which shops, doctors, religious services, and political events they go to, and with whom they choose to associate"). Location data can therefore reveal extensive sensitive information about political, religious, and professional relationships. *See Jones*, 556 U.S. at 415 (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Amici agree with Petitioner that *Riley* and *Jones* support the conclusion that CSLI can reveal a wealth of uniquely sensitive information. *See* Pet'r. Br. at 12, 38. The disclosure of such closely-held information may result in First Amendment harms. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."). "Awareness that the Government may be watching chills associational and expressive freedoms." *Jones*, 565

U.S. at 416 (Sotomayor, J., concurring). Where surveillance implicates private location information, it can stifle dissent and the exercise of First Amendment rights. *See Government Surveillance: U.S. Has Long History of Watching White House Critics and Journalists*, Newsweek (Jun. 23, 1975; republished Jul. 24, 2017) (stating that in 1969 CIA agents "took photographs of White House demonstration leaders, recorded their auto license plates and sometimes even followed them home," and that the "CIA also followed newsmen in 1967, 1971 and 1972 in order to identify their sources"), https://perma.cc/B76N-3Z6B; *FBI releases files on columnist Jack Anderson*, NBC News (Oct. 11, 2008) (explaining that government documents obtained under the Freedom of Information Act reflected "summaries of [a columnist's] movements while under surveillance, and FBI memos detailing efforts to find his sources who leaked information from deep inside government agencies"), https://perma.cc/XD9R-FVM2.

First Amendment freedoms are protected not only from "frontal attack," but also from "being stifled by more subtle governmental interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). Warrantless acquisition of CSLI is the type of "subtle governmental interference" that can chill the robust exercise of associational and expressive rights.

B. CSLI acquisition threatens the news-gathering process.

CSLI can disclose particularly sensitive details about the journalistic process: It can reveal the stories a journalist is working on before they are published, where a journalist went to gather information

for those stories, and the identity of a journalist's sources. In part because location information can reveal so much about the journalistic process, reporters seek to ensure the locations where they meet their sources are kept private. Exposure of sources and journalistic methods can put sources' jobs and lives at risk, compromise the integrity of the newsgathering process, and have a chilling effect on reporting.

Among journalists, meeting in person with sources is widely considered the most secure form of communication. *See Meeting in Person Most Common Way to Protect Sources*, Pew Research Center (Feb. 4, 2015) (noting that 59% of reporters surveyed had met in person to protect a source), https://perma.cc/84RN-FRZ9. Confidentiality is a critical component of the reporter-source relationship, and effective newsgathering depends on an expectation of privacy in the location, time, and duration of those confidential meetings and communications. Communicating with confidential sources is a core journalistic practice and a necessary feature of investigative journalism. The confidentiality of these in-person meetings is compromised when law enforcement can obtain information about journalists' or sources' whereabouts without a warrant.

Some of the most important reporting on the functioning of government has depended on confidential sources. One of the most famous confidential sources, "Deep Throat," provided information to *Washington Post* reporters Bob Woodward and Carl Bernstein, exposing the Watergate scandal. More recently, news organizations have used confidential sources to report on harsh interrogations techniques

conducted by U.S. law enforcement, *see, e.g.*, Scott Shane, David Johnston, James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times (Oct. 4, 2007), http://nyti.ms/1dkyMgF; the Central Intelligence Agency's use of a network of secret prisons for terrorism suspects, *see, e.g.*, Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post (Nov. 2, 2005), http://wapo.st/Ud8UD; and an illegal wiretapping program at the National Security Agency, *see, e.g.*, James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), http://nyti.ms/nelMIB. In the last year, reporters have relied upon confidential sources to inform the public about everything from foreign policy, *see, e.g.*, Souad Mekhennet and Joby Warrick, *U.S. Increasingly Sees Iran's Hand in the Arming of Bahraini Militants*, Wash. Post (Apr. 1, 2017), https://perma.cc/ZUA4-8HV7, to foreign threats to the 2016 presidential election, *see, e.g.*, Eric Lichtblau, *C.I.A. Tracked Russian Prying in the Summer*, N.Y. Times (Apr. 7, 2017), https://nyti.ms/2oOwTBz.

As these examples demonstrate, investigative reporting based on confidential sources is a necessary part of the fabric of an informed democratic society and fosters the civic literacy that forms the bedrock of democratic discourse. According to the Society of Professional Journalists, although identifying sources is ideal, "[a]nonymous sources are sometimes the only key to unlocking that big story, throwing back the curtain on corruption, fulfilling that journalistic missions of watchdog on the government and informant to the citizens." Michael Farrell, *Anonymous Sources*, SPJ Ethics Committee Position Paper,

https://perma.cc/5BQB-SRA3. Indeed, without confidential sources, journalists "would be relying on the official side of the story, and the official side of a story isn't always the whole side." Lana Sweeten-Shults, *Anonymous sources vital to journalism*, USA Today (Feb. 27, 2017), https://perma.cc/AV7V-Z4K8.

Although confidentiality is of utmost importance, contemporary investigative newsgathering often depends on a smartphone. Cell phones now serve as "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers"—all tools that are integral to the journalistic profession. *Riley*, 134 S. Ct. at 2489. Journalists use cell phones to email sources and editors, write pitches, record interviews, capture photos and video to accompany stories, conduct research, monitor breaking news, and engage with their readership on platforms such as Twitter and Facebook. Leaving a cell phone behind while conducting field research and meeting with sources on a regular basis would severely hamper the goal of gathering details about a story.

Journalists are aware that the government is increasingly using electronic surveillance in general—and specifically the Stored Communications Act ("SCA"), 18 U.S.C. § 2703(d), orders at issue in this case—to target cell phones and similar communication devices. *See* Spencer S. Hsu, *Court: Warrantless requests to track cellphones, Internet use grew sevenfold in D.C. in three years*, Wash. Post (Jul. 18, 2017), https://perma.cc/W6TN-VVGW (explaining that warrantless SCA requests to the U.S. District Court for the District of Columbia grew sevenfold in the past three years). Concerns about the vast scope of sur-

veillance has already caused some journalists to take steps to try to avoid that surveillance—including limiting their use of important tools that are critical to newsgathering. *See With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy*, Human Rights Watch (Jul. 28, 2014), https://perma.cc/LJ9E-88YS (noting in a 120-page study that several journalists reported turning off their phones, removing phone batteries, or leaving phones behind when meeting in person with sources); *see also* Dan Gillmore, *Beyond Encryption*, Colum. J. Rev. (May 7, 2012), https://perma.cc/43DN-SNPN ("If you do need to talk to [a source] using a cell phone, Fed-Ex them a prepaid phone, and tell them not to use it, or even turn it on, near their home/office.").

Surveillance has also made sources less willing to inform reporters about issues of public concern. In 2013, for example, the Associated Press learned that the Justice Department had seized records from twenty AP telephone lines used by more than 100 AP reporters and editors. *See* Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, Associated Press (May 13, 2013), https://perma.cc/2P8J-RTPT. AP President and CEO Gary Pruitt discussed the impact of the surveillance during a speech at the National Press Club: "In some cases, government employees that we once checked in with regularly will no longer speak to us by phone and some are reluctant to meet in person." Lindy Royce-Bartlett, *Leak Probe Has Chilled Sources, AP Exec Says*, CNN (Jun. 19, 2013), https://perma.cc/VU8T-6HUP.

As Justice Marshall wrote nearly forty years ago in his dissenting opinion in *Smith v. Maryland*,

"Permitting governmental access to telephone records on less than probable cause may [ ] impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society." 442 U.S. 735, 751 (1979) (Marshall, J., dissenting). It is unsurprising that fear of warrantless location tracking chills reporter-source communications and impedes newsgathering, harming the flow of information to the public.

III. Fourth Amendment protections should be rigorously applied when the government seeks to obtain CSLI because First Amendment interests are at stake.

Amici agree with Petitioner that the Fourth Amendment should apply when the government seeks to obtain CSLI. In addition to the reasons set forth by Petitioner, Fourth Amendment protections should also apply because CSLI implicates First Amendment rights.

Consistent with the historic relationship between the First and Fourth Amendments, *see supra* Section I, this Court has found that where the materials to be searched "may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" *Zurcher*, 436 U.S. at 564 (quoting *Stanford*, 379 U.S. at 485). In *Zurcher*, this Court considered the constitutionality of a search warrant authorizing the search of a newspaper's office for evidence of a crime. *Id.* at 563. The Court held that, under the particular facts of that case, the Fourth Amendment's warrant requirements were sufficiently protective of First Amendment rights. *Id.* Specifically, this Court stat-

ed that "[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." *Id.* at 565. These Fourth Amendment safeguards are the minimum necessary for protecting against First Amendment harms.

The form of process at issue in this case—an order under the Stored Communications Act—lacks any Fourth Amendment safeguards at all. SCA orders for historical CSLI do not require probable cause, reasonableness, or specificity with respect to the scope of the search. Rather, they require only a showing of "specific and articulable facts" demonstrating that the material sought is "relevant and material" to an investigation. 18 U.S.C. § 2703(d). This lower standard impermissibly permits the government to obtain CSLI, which implicates associational, expressive, and newsgathering activities, without satisfying the Fourth Amendment safeguards found in *Zurcher* to be sufficient to protect First Amendment rights

IV. The U.S. Court of Appeals for the Sixth Circuit's application of the third-party doctrine to CSLI records imperils the free and unfettered exercise of First Amendment rights.

The U.S. Court of Appeals for the Sixth Circuit, below, held that the government's collection of Petitioner's CSLI was not a Fourth Amendment-protected search because Petitioner had no reasona-

ble expectation of privacy in CSLI created and maintained by a cellular service provider. *United States v. Carpenter*, 819 F.3d 880, 889–90 (6th Cir. 2016). In reaching this holding, the divided three-judge panel relied upon this Court's decisions in *Smith*, 442 U.S. 735, and *United States v. Miller*, 425 U.S. 435 (1976). *Id.* at 887–89; *see also United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 479 (2015), (similarly holding that *Smith* and *Miller* lead to the conclusion that there is no Fourth Amendment protection for CSLI records); *Graham*, 824 F.3d 421 (same); *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013) (same). *Compare In re Application of the U.S. for an Order Directing a Provider of Elec. Commc'n Serv. To Disclose Records to Gov't*, 620 F.3d 304 (3d Cir. 2010) (distinguishing *Smith* and holding that a magistrate judge has the discretion to require a warrant for CSLI). Contrary to this Court's instruction that Fourth Amendment requirements be applied with "scrupulous exactitude" when law enforcement seeks to obtain material that "may be protected by the First Amendment," *Zurcher*, 436 U.S. at 564, the panel's decision interpreted the so-called third-party doctrine so broadly as to seemingly foreclose *any* application of the Fourth Amendment's protections to CSLI.

In *Miller*, this Court held that a bank customer has no reasonable expectation of privacy in checks and deposit slips held by a bank because that information was voluntarily "revealed to a third party"—*i.e.*, the bank. *See Miller*, 425 U.S. at 442. In *Smith* the Court applied similar reasoning in the context of a telephone company, finding no "legitimate expecta-

tion of privacy in the numbers [petitioner] dialed" over a short period of time, which the government obtained from the phone company using a subpoena. 442 U.S. at 742.

Lower courts have drawn from these cases the proposition that individuals do not have a Fourth Amendment protected interest in information voluntarily conveyed to third parties—what has come to be known in Fourth Amendment jurisprudence as the third-party doctrine. *See Graham*, 824 F.3d at 425 (citing *Smith* and *Miller* to explain the "rule—the third-party doctrine," which states "that an individual enjoys no Fourth Amendment protection 'in information he voluntarily turns over to [a] third part[y]" (internal citations omitted)); *Davis*, 785 F.3d at 512. As this Court has recognized, however, a "mechanical interpretation" of the third-party doctrine, especially in the context of advancing technology, can erode constitutional rights. *Kyllo v. United States*, 533 U.S. 27, 35 (2001); *see also Davis*, 785 F.3d at 537 (Martin, J., dissenting) (describing the "slippery slope that would result from a wooden application of the third-party doctrine").

As explained above, First Amendment rights are placed in jeopardy when law enforcement can, broadly-speaking, invade the privacy of professional, political, and religious associations without a warrant. *See supra* Section II. And an overbroad application of the third-party doctrine is particularly pernicious to the press. Although the third-party doctrine is based on the premise that parties voluntarily convey information to third-party companies, journalists, like other cell phone users, do not "voluntarily" share their location with a cell phone provider "in any

meaningful way," *In re Application of the U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't*, 620 F.3d at 317, because there is no action in placing or receiving a call that would alert the journalist that he or she is conveying location information to the wireless carrier. Although journalists are aware of location tracking, they and their sources may be unaware of the extent and specifics of the surveillance—namely, that cell service providers obtain and store CSLI. *See id.* ("[I]t is unlikely that cell phone customers are aware that their cell phone providers *collect* and store historical location information.").

Even if journalists are aware that service providers collect historical CSLI, journalists are dependent on their cell phones to contact sources, communicate with editors, disseminate news, and generally engage in the craft of contemporary newsgathering. *See Graham*, 825 F.3d at 445–46 (Wynn, J., dissenting in part and concurring in the judgment) (finding that CSLI is not voluntarily conveyed by a cell phone user in part because "CSLI is purely a function and product of cellular telephone technology, created by the provider's system network . . .") (quoting *Commonwealth v. Augustine*, 4 N.E.3d 846, 862 (2014)). Because third-party cell service companies obtain users' location data "for the specific purpose of directing the routing of information," *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008), journalists necessarily must allow cell service companies to obtain their CSLI in order to use a cell phone. As Justice Sotomayor noted in *Jones*, the third-party doctrine is "ill suited to the digital age, in which people reveal a great deal of information about them-

selves to third parties in the course of carrying out mundane tasks." 565 U.S. at 417 (Sotomayor, J., concurring). Journalists in particular reveal a great deal of information when using cell phones, not only in the course of carrying out routine tasks, but also in the course of gathering and disseminating the news.

As this Court previously recognized, magistrate judges assessing warrant applications play a crucial role in assuring that "the requirements of specificity and reasonableness are properly applied, policed, and observed" to protect First Amendment rights, including those of journalists. *Zurcher*, 436 U.S. at 566. When the third-party doctrine is expanded to permit warrantless acquisition of location data, that vital check on government overreach that is essential to enabling the full-throated exercise of First Amendment rights disappears. A Fourth Amendment warrant, and nothing less, is necessary to protect the interests of the press and public in the context of long-term CSLI tracking. "No less a standard could be faithful to First Amendment freedoms." *Stanford*, 379 U.S. at 485.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the U.S. Court of Appeals for the Sixth Circuit opinion below.

Respectfully submitted,

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